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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

CLAYTON JACKSON,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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INTRODUCTION AND INTEREST OF AMICI

This case implicates, and the decision below threatens, fundamental rights bestowed on all citizens by different provisions of the federal constitution. Under the First Amendment, all citizens have the right to petition for the enactment of legislation furthering their interests and reflecting their policy choices. In our democratic system, "from the beginning of the Nation," one form that such constitutionally protected conduct has taken is "private contributions or expenditures" supporting particular legislators or candidates. *McCormick v. United States,* 500 U.S. 257, 273 (1991).

Secondly, citizens have a constitutional right under the Fifth Amendment's due process clause to be free from governmental schemes to entrap them in criminal conduct which they were not predisposed to engage in prior to being subjected to the government's inducements. *Jacobson v. United States,* 112 S.Ct. 1535 (1992).

Finally, under the Tenth Amendment and Republican Form of Government clause, citizens have a right to a state government that operates free of control by the federal sovereignty within the areas reserved to the states by the Constitution of the United States. *See, e.g., New York v. United States,* 505 U.S. _____, 112 S.Ct. 2408 (1992) (federal government cannot conscript state governments to act as its agents in areas outside federal government's constitutionally enumerated powers or in manner which infringes on sovereignty of states reserved by Tenth Amendment). Likewise, state legislatures are entitled to conduct their business free of unwarranted federal interference. *Davids v. Akers,* 549 F.2d 120, 127 (9th Cir. 1977) (federal court ought not to interfere with the procedural operation of a state legislature, because the Tenth Amendment restricts its power over "[t]he conduct of integral government functions").[1]

The Ninth Circuit's decision in *United States v. Jackson, as amended,* 72 F.3d 1370 (9th Cir. 1995), constrains the vigorous exercise of the rights to speech, petition, and association that all citizens, including political lobbyists, enjoy. Furthermore, in this case, the federal government took control of a key state legislator and maintained him in office for the sole and exclusive purpose of actuating a scheme to criminalize political discussion, a stratagem both

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[1] *Davids* cited a Supreme Court decision that has since been overruled, but there is no indication that *Davids* would have been decided differently had that case not existed.

repugnant to the First Amendment and violative of the Fifth and Tenth Amendments. Review of the decision below is mandated in a case of such importance.

This brief is filed on behalf of amici profoundly concerned with the issues raised by the *Jackson* case. The Committee of Concerned Governmental Affairs Specialists consists of a group of professional governmental affairs specialists. Its members are individuals with extensive experience in both politics and law. Most have been involved in lobbying the California Legislature for over twenty years; several are members of the California State Bar. The group includes individuals who have served as members of the California Senate and Assembly. The chair and counsel of the committee, George Zenovich, is both a former member of the California Senate and retired justice of the California Court of Appeal.

As governmental affairs specialists, members of this group have represented and do represent a wide spectrum of interest groups active in California political affairs including, as a representative sample, manufacturing, agriculture, insurance, franchise, construction, and government entities, as well as pharmacists, professional associations, service industries, and small business retailers. In pursuing a profession that is both honorable and necessary to the effective functioning of the business of government, committee members must interact with, and seek to influence, elected officials. Governmental affairs specialists are entitled to guidance on the boundary between advocacy which the Constitution blesses and that which the criminal law may punish, and to protection from prosecutorial practices that unfairly seek to convert the former into the latter. The *Jackson* decision puts the liberty of governmental advocates in jeopardy.

The second group of amici consists of present and past members of both houses of the California Legislature. These Senators and Assembly members, both Democratic and

Republican, have served on dozens of legislative committees and collectively have contributed centuries of dedicated service to California's state government.

They include Senator Nicholas Petris, who has served in the State Assembly and Senate since 1959; Senator Alfred E. Alquist, a member of the California Legislature since 1962; Senator Ralph Dills, a member of the California Legislature for fifty-six-years; Senator Milton Marks, who has served in the California Legislature since 1967; Senator Hershel Rosenthal, who has served in the California Legislature for over twenty years; and Senator Newton Russell, who has served in the California Assembly and Senate since 1964.

Former legislators joining as amici include Senator Marz Garcia, Senator John Foran, Senator John Knox, Senator Edward Davis, Senator Ollie Speraw, Assemblywoman Sunny Mojonnier, Senator Peter Behr, Assemblyman Jerry Eaves, Senator Robert Presley, and Senator James Mills.

These legislators have an enduring interest in the protection of California's constitutional right to an independent and republican form of government free from undue interference by the federal executive.

STATEMENT OF FACTS

The facts are set forth in Jackson's petition for certiorari. We summarize only those facts relevant to the issues which we urge before this Court.

In 1986, the FBI began investigating suspected corruption in the California legislature. The operation involved federal infiltration into the state's legislative process. In related cases, federal agents set up fictitious corporations with FBI agents posing as businessmen, introduced fake bills into the California legislature, and sought support for the fake bills through illicit payments to legislators and legislative staff.

The F.B.I. actually got one piece of legislation enacted, then told the governor to veto the bill because it was a fake, but persuaded him to keep the entire matter secret so the federal agents could reintroduce the fake bill in the next legislative session.

The phase involving Senator Robbins began in 1991. Robbins was then Senator for the 20th District of California, as well as chairman of the Senate Insurance, Claims and Corporations Committee. Robbins had held his seat for over eighteen years and had chaired the Insurance Committee since 1981. He was also chairman of the Committee on Government Efficiency and a member of the Banking and Commerce Committee, the Budget and Fiscal Review Committee, and the Transportation Committee.

On June 4, 1991, Robbins agreed to plead guilty to racketeering and tax evasion charges at a later date and, in the meantime, to cooperate with the FBI and the U.S. Attorney in exchange for a considerably reduced sentence.

From early July, 1991, through November 13, 1991, Senator Robbins was an agent of the federal government, directed by Assistant United States Attorney John Vincent and Special Agent James Wedick of the FBI. During this period, Robbins secretly recorded his conversations with Jackson.

Jackson, a managing partner for the San Francisco law firm of Sullivan, Roche & Johnson, was a principal in the firm SRJ Jackson/Barish & Associates, a lobbying group representing, among others, various insurance industry interests.

On November 21, 1991, with the legislature in recess, Robbins resigned his office, and a short time later pleaded guilty to racketeering and tax evasion. In recognition of his central role in securing Jackson's indictment, Robbins' sentence was reduced from five years to two years.

Jackson was indicted in February, 1993, and convicted in December, 1993, on one count of racketeering, one count of conspiracy to commit mail fraud and money laundering, and eight counts of mail fraud. Aside from Robbins' testimony, Jackson's conviction rests largely on the tape-recordings made by Robbins when he was functioning in his dual capacity as a state senator and as an agent of the federal executive.

During the almost five months that Robbins was an agent of the federal government, he remained a Senator and chairman of the Insurance Committee. Over this period, Robbins cast numerous votes, chaired regular meetings of the Insurance Committee, issued many committee reports with recommendations as to the disposition of bills submitted to the Committee, and was otherwise involved in conducting the business of the Senate and of the State.[2] Neither his colleagues in the legislature nor any other member of the state government was aware that he was permitted to remain in the state Senate by the FBI for the sole purpose, to use Agent Wedick's words, of "working off a beef."

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[2]Records of the California Senate establish that while serving as a federal agent Robbins cast in excess of one hundred votes on pending legislation.

REASONS FOR GRANTING CERTIORARI

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT'S RULING IS AT ODDS WITH FIRST AMENDMENT FREEDOMS OF SPEECH, PETITION, AND ASSOCIATION.

A. Freedoms of Speech, Petition, And Association.

Lobbying[3] is political speech and as such is secured by the First Amendment. While this Court has recognized that lobbying is protected by the First Amendment, it has not fully delineated the extent of this protection.[4] Lower courts,

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[3] Webster's Ninth New Collegiate Dictionary provides the following definition of lobbying:

> [T]o conduct activities aimed at influencing public officials and esp. members of a legislative body on legislation . . . to promote (as a project) or secure the passage (as legislation) by influencing public officials . . . to attempt to influence or sway (as a public official) toward a desired action.

Thus stripped of its invidious connotations, lobbying can be seen for what it is: a manner of exercising the rights of speech and, in particular, of petition. Not surprisingly, lobbying "in one form or another has been with us from the beginning . . . . It has, indeed, been so deeply woven into the American political fabric that one could, with considerable justice, assert that the history of lobbying comes close to being the history of American legislation." Lane, *Lobbying and the Law* 18 (1964).

[4] *See Rumely v. United States*, 345 U.S. 41, 48 (1953) (Federal Regulation of Lobbying Act (the "Act") authorizing investigation of lobbying activities, however remote "the radiations of influence" they exert on the legislative process, raises doubts of constitutionality in view of First Amendment prohibitions); *United States v. Harriss*, 347 U.S. 612, 625 (1954) (construing the Act so as not to infringe upon lobbyists' First Amendment "freedom[s] to speak, publish and petition the Government"); *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 138-139 (1961) (declining to construe the Sherman Act as applicable to lobbying activity because it "would raise important constitutional questions. The right of petition is one of the

however, have articulated the existence of specific constitutional protection for lobbying.[5]

Whatever the specificity of this Court's statements on the subject, there can be no doubt "[d]iscussion of public issues" is "integral to the operation of the system of government established by our Constitution," and that "[t]he First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " *Buckley v. Valeo*, 424 U.S. 1, 14 (1975), quoting *Roth v. United States*, 354 U.S. 476, 484 (1957). It follows that lobbyists, whose very livelihood depends upon the "discussion of public issues" and the direct petitioning of government officials, may rightly claim the full breadth of First Amendment protections.

Constitutional protection for lobbying activities is also embraced within the freedom of association guaranteed by

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freedoms protected by the Bill of Rights . . . "); *see also United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) (First Amendment protects concerted efforts to influence public officials).

[5] *See, e.g., Liberty Lobby v. Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1968) ("[w]hile the term 'lobbyist' has become encrusted with invidious connotations, every person or group engaged . . . in trying to persuade Congressional action is exercising the First Amendment right of petition"); *Moffet v. Killiam*, 360 F.Supp. 228 (D. Conn. 1973) ("The mere fact . . . that one earns a living by exercising First Amendment rights does not vitiate the ability to assert those rights . . . one does not forfeit First Amendment rights because he pays someone to exercise them for him."); *see also United States v. Margiotta*, 688 F.2d 108, 128-129 (2nd Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) ("the activities of lobbyists and others who seek to exercise influence in the political process are basic in our democratic system"). For its part, the California Supreme Court recognizes that lobbying is an exercise of the First Amendment right of petition. *Fair Political Practices Commission v. Superior Court*, 25 Cal.3d 33, 46-49 (1979) (upholding registration and disclosure laws, but finding transaction reporting requirement "[c]onstitutes an unnecessary curtailment of the right to petition").

the First Amendment. The language and the reasoning employed in the cases involving "associational privacy" support such protection. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (statute compelling teachers to disclose organizational affiliations invalidated because even legitimate and substantial governmental purpose "cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved"). Any doubts on the applicability of this doctrine to the regulation of political speech were put to rest in *Buckley*. *See* 424 U.S. at 64; *see also Service Employees International Union v. Fair Political Practices Commission*, 955 F.2d 1312, 1322-1323 (9th Cir.), *cert. denied*, ____ U.S. ____, 112 S.Ct. 3056 (1992) (ban on inter- and intra-candidate transfers of political contributions violates First Amendment because it discriminates against challengers and contributors who wish to associate themselves with them).

Regardless of the label chosen or the formula applied, the Constitution clearly protects lobbying, including the making of campaign contributions, as an exercise of fundamental rights. Indeed, because lobbyists are engaged in speech, petition, and association activities which are by their very nature political, they enjoy the broadest protection from government interference.

B. The Ninth Circuit's Approval Of Jackson's Bribery-Related Convictions, In The Absence Of A Quid Pro Quo Instruction, Offends The First Amendment.

The indictment here alleged Jackson "knowingly and intentionally gave and offered to give a bribe" to Robbins as defined in California Penal Code § 85. The charge then was modified by the following definition:

> [s]pecifically, defendant CLAYTON R. JACKSON gave and offered to give a campaign contribution to influence Alan E. Robbins in connection with pending legislation . . . .

This allegation, as phrased and without more, simply does not describe an illegal act. The language used connotes a lawful campaign contribution. It *could* describe a bribe, but only if a quid pro quo is supplied by the reader. Yet the adverb "specifically" implies that what is to follow is the gist, the factual essence of what constitutes the "bribe" under California Penal Code § 85.

This language does not come close to describing a contribution "made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." *McCormick v. United States*, 500 U.S. 257, 111 S.Ct. 1807, 1816 (1991). In *McCormick*, the Court ruled that no Hobbs Act violation occurs unless a contribution is given in exchange for an explicit promise of official action, as opposed to a contribution made with a general expectation of favorable official action: "To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law *but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.*" *Id.* (emphasis added).

The "quid pro quo" requirement announced in *McCormick* must be applicable to California Penal Code § 85. To the extent the statute may criminalize constitutionally protected activity, the "quid pro quo" standard must be met to ensure that the distinction between a lawful campaign contribution and a bribe is preserved. The Ninth Circuit's ruling to the contrary is simply insupportable.[6]

The absence of a *quid pro quo* charge here was made worse by the trial court's refusal to give defense instructions which correctly addressed the First Amendment issues. Among the instructions refused, the following were of particular importance:

- *Proposed Jury Instruction No. 3:* "The fact that Defendant Jackson made recommendations to lobbying clients as to the making of campaign contributions to legislators expecting to gain special access or influence, or with a general expectation of benefitting himself or his clients does not, without more, constitute bribery."
- *Proposed Jury Instruction No. 4:* "Before a campaign contribution to an elected official may be found to be an illegal bribe, there must be clear evidence that the payment was made in return for an explicit promise or undertaking by an official to perform or not to perform an official act. In other words, a quid pro quo exists, and a bribe may be found, only where the official asserts that his official conduct will be controlled by the terms of the promise or undertaking."
- *Proposed Jury Instruction No. 6:* "Soliciting political contributions—communicating with others to seek their

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[6] As Jackson's petition for certiorari makes clear, although the Ninth Circuit appears to recognize the *quid pro quo* issue is one of first impression, its legal analysis is confined to a single conclusory sentence: "[W]e decline to read such a [*quid pro quo*] requirement into First Amendment jurisprudence today." *Jackson*, 72 F.3d at 1376.

ideological and financial support for a political cause—is also protected by the Constitution. California law does not limit the amount of such contributions that any individual, entity or corporation may make as long as the California Political Reform Act as to the reporting of the expenditure and receipt on campaign contributions is complied with."

These instructions were crucial to proper deliberation of the issue of what constitutes an impermissible quid pro quo as opposed to a generalized anticipation of favorable official action.

The jury in this case was permitted to conclude that campaign contributions given in legitimate ways for legitimate purposes could be equated with bribes. After *Jackson*, a lobbyist who recommends to a client the making of a campaign contribution or, for that matter, any citizen or organization who makes such a contribution, risks conviction under vague and unconstitutional standards by which Jackson was found guilty.

This Court's review of this critical convergence between First Amendment protections and federal criminal law is now required.

II. IN LIGHT OF THE GOVERNMENT'S INVESTIGATIVE TACTICS IN THIS CASE, THE RULING BELOW ON THE ENTRAPMENT ISSUE IMPERMISSIBLY CHILLS LOBBYISTS IN THE FREE EXERCISE OF THEIR FIRST AMENDMENT RIGHTS, RAISING A QUESTION WORTHY OF THIS COURT'S REVIEW

This is not a case in which a legislator, after being approached by a lobbyist (or citizen) with a bribe or other corrupt offer, reported that illegal advance to law enforcement authorities, and then agreed to gather evidence through the use of a wire. Had it been, the subsequent

revelation of the investigative technique logically would "chill" only those who might intend to initiate illicit discussions with legislators.

Here, Alan Robbins was a legislator of great power with whom lobbyists and all interested in legislative issues affecting insurance had to deal. Yet, at a certain point, he ceased the pursuit of the legislative function bestowed upon him by the vote of his constituents, and remained in office solely for the purpose of reducing his well-earned criminal sentence by ensnaring an advocate whose duty to his clients required him to hold discussions of pending legislation with Robbins. The F.B.I. directed Robbins to initiate discussions of money with the advocate, although the advocate himself did not raise that topic. So directed, Robbins embodied the dangers for Jackson that the California Supreme Court touched upon in *People v. Bunkers*, 84 P. 364 (Cal. 1905) ("A rebuff to the bribe seeker, gives rise to dangers, born of resentment, which are scarcely capable of estimation").

The chief danger of such an investigative scheme is the threat of undeserved criminal investigation and prosecution which may deter many groups and individuals from engaging in constitutionally protected activity and some even from entering the lobbying process. *See United States v. Nofziger*, 878 F.2d 442 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1003 (1991) (Court of Appeal "disinclined" to treat subsection of Ethics in Government Act as imposing strict liability "[b]ecause of its potential for chilling speech"). "If the government's interpretation . . . were correct, a prudent man would avoid even permissible lobbying" because the government's construction of the statute "[c]ould convert what he believed to be a permissible communication into a felony"). *Id.* at 454.[7]

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[7]The Seventh Circuit was alert to this danger in a slightly different context. In *United States v. Craig*, 528 F.2d 773, 779 (7th Cir. 1976),

Here, prudence would make a legislative advocate suspect that any legislator with whom he must deal may be concerned not at all with the merits of legislation, but with securing the advocate's indictment. Indeed, newspaper accounts offer vivid evidence of the effect which the government's investigation has had on the California legislature:

> "We're operating on the theory that everybody's wired," says one staffer, referring to recording devices. Another political veteran observes: "Anytime you know there are people wearing wires around town, that is inevitably going to change relationships. What are you going to do, frisk your friend before lunch?"

Los Angeles Times, April 29, 1993, A3, col 1.

Aware of the *Jackson* holding, a prudent person would fear far more than being detected in the tendering of quid pro quo offers to legislators. The advocate could not avoid conviction by following the *McCormick* rule: i.e., by making sure that he did not seek an explicit promise in exchange for his client's support of, or campaign contribution to, the legislator. Rather, he would have to be certain that his attempt to influence legislation could not be deemed "wrongful", a term left to be defined by prosecutor or jury. Needless to say, in such circumstances constitutionally protected forms of speech, such as promises of continued

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the court held that in the Hobbs Act prosecution of a state legislator, the legislator enjoyed a speech or debate privilege derived from federal common law. The Court noted that "[a] legislator in considering whether to support or oppose a proposed law must be free to reflect on the merits; he must not be deterred from advocating a position by the threat of prosecution by a hostile executive. The evil is the fact of deterrence[.]" *Id.* at 778. It is similarly true that a lobbyist should not be restrained from vigorously advocating his or her position out of fear of criminal prosecution. It is in this context that the threat of deterrence and that of selective enforcement most dangerously intersect.

support for a legislator and his positions, will necessarily be deterred.

Moreover, *Jackson* removes another safe haven for good-faith political advocates: their lack of predisposition to bribe. Prior to *Jackson*, even if a lobbyist could not prevent a legislator "working off a beef" from linking pending legislation and contributions in their discussions, he or she could not be convicted in the absence of any prior history of corruption that would justify his or her being subjected to such inducements. *Jacobson v. United States*, 112 S.Ct. 1535 (1992); *United States v. Stenberg*, 803 F.2d 422, 429 (9th Cir. 1986) (The "manufacture . . . of new crimes from start to finish is constitutionally unacceptable."). *Jackson*, however, permits conviction based on nothing more than speech without a finding of predisposition on the defendant's part to bribe, making governmental advocacy a truly hazardous calling.

Approval of the tactics employed by the government in this case will chill not only lobbyists, but also potential contributors in exercising their right to associate with the candidate or cause of their choice. Passive contributors, as much as active political participants, may find their safest course to be abstention from the political process.

The tactics of the government, if condoned, will serve to retard the free and vigorous public debate of issues and policies which is the touchstone of the American political system. Those among the most actively and directly engaged in political advocacy will simply forego the exercise of their First Amendment rights or fail to take full advantage of the breadth of First Amendment protections. For these reasons, a grant of certiorari is in order.

III. THE FEDERAL GOVERNMENT'S INVESTIGATION AND PROSECUTION OF SUSPECTED CORRUPTION IN THE STATE LEGISLATURE FLOUTS THE SAFEGUARDS PROVIDED BY THE TENTH AMENDMENT AND THE REPUBLICAN FORM OF GOVERNMENT CLAUSE

In securing Jackson's indictment, the Federal Bureau of Investigation and the United States Attorney intruded improperly into the processes of the California legislature.

- Federal agents gathered evidence of racketeering and tax evasion against Alan E. Robbins, an incumbent state senator and chairman of a powerful committee, leading to his admission of felonious conduct and abuse of his office, conduct which disqualified Robbins from further service as a state senator. The agents, however, persuaded Robbins to plead guilty at a later date and meanwhile to act as their undercover agent in return for a considerably reduced sentence.

- For a period of five months, federal agents withheld from the Senate and citizens of California the fact that Robbins was guilty and had agreed to plead, thereby thwarting state recall and vacancy-filling provisions of the California Constitution and the disciplinary procedures of the Senate.

- Federal agents required Robbins to devote his loyalty and attention to them, thus compromising further his capacity to perform as a state senator. Surely this situation altered Robbins' votes, performance on committees, and relationships with his colleagues and constituents.

- In related cases, federal agents set up fictitious corporations with FBI agents posing as businessmen, introduced fake bills into the California legislature, sought support for the fake bills through illicit payments to legislators and legislative staff, actually got one piece of legislation en-

acted, then told the governor to veto the bill because it was a fake, but persuaded him to keep the entire matter secret so the federal agents could reintroduce the fake bill in the next legislative session.

The FBI has threatened future investigations of this kind with the FBI assuming the role of political police: "This is not over. The FBI is going to continue it; in fact, we'll in a sense be a lobbyist for the citizens of California." (Statement of Richard Ross, Special Agent, FBI Sacramento Office contained in transcript of press conference by George O'Connell, United States Attorney for the Eastern District of California, held April 27, 1993).

There is no doubt that the federal government may investigate and prosecute state officials, including legislators, for violations of federal criminal laws. Nor is there any doubt undercover agents may be used. "As [this Court's] cases emphasize, however, even when Congress has decided to engage in some regulation of the state governmental officials, concerns of federalism play a vital role in evaluating the *scope* of the regulation." *Evans v. United States,* 119 L.Ed.2d 57, 89 (1992) (Thomas, J., dissenting). There is a difference in kind, not in degree, when federal agents begin to subvert the state legislative process itself through such means as the direction of state legislators in the performance of their duties, the introduction of fake bills, and the like.[8]

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[8] "The Constitution creates a federal system of government .... [S]tate legislatures acting within the scope of their powers perform a function as vital to the governance of the state as the role Congress fulfills with regard to the nation as a whole .... While it is within the province of the United States Attorney to prosecute local officials who violate federal law, the primary responsibility for ferreting out their political corruption must rest, until Congress directs otherwise, with the State, the political unit most directly involved."
United States v. Craig, 528 F.2d 773, 778-779 (7th Cir. 1976).

The principle of federalism inheres in the very structure of the Constitution and finds expression in provisions such as the Tenth Amendment, the doctrine of enumerated powers articulated in Article I, Section 8, and the federal guarantee to the states of a republican form of government in Article IV, Section 4. As Alexander Hamilton stated, "[t]he . . . Constitution, so far from implying the abolition of the State governments . . . leaves in their possession certain exclusive and very important portions of sovereign power." *The Federalist,* No. 9 at 76 (C. Rossiter ed., 1961).

For that reason, the courts have long recognized areas reserved to the states' exclusive control. States alone hold the power to prescribe the qualifications of their most important government officials, *Taylor v. Beckham,* 178 U.S. 548, 570-571 (1900), the power to determine the location of the state capitol and to appropriate funds for that purpose, *Coyle v. Oklahoma,* 221 U.S. 559, 565 (1911), and the power to regulate local elections. *United States v. Bowman,* 636 F.2d 1003, 1011 (5th Cir. 1981); *see also, James v. Bowman,* 190 U.S. 127, 142 (1902) (invalidating federal bribery law as applied to purely local elections on the ground that Congress lacked the power to regulate such elections).

The principle underlying these and similar cases is at stake here. The federal government has never before conducted an investigation by such extensive covert interference with a state legislature and secret frustration of state laws. These surreptitious actions interfered with the functioning and independence of the California legislature and the rights of California's citizens. If the FBI can dictate a state legislator's other actions in return for a reduction in the legislator's pending sentence, why can they not dictate his vote on pending legislation as part of his "working off his beef?" The government's tactics flout California's sovereignty, and are by themselves sufficient to warrant this Court's scrutiny.

The federal government has conducted an undercover operation that utilized a sitting state senator to engage a lobbyist in discussions presumptively valid under the First Amendment. The Ninth Circuit has inestimably compounded the threat to First Amendment rights posed by the nature of the investigation and prosecution of the case by approving a blurring of the line between legitimate campaign contributions and bribes. While we must be vigilant against the corruption of our public officials as well as of those who attempt to corrupt them, our vigilance should not come at the expense of our defining liberties. "The potential for abuse, of course, is particularly grave in the inherently political context of public-corruption prosecutions." *Evans,* 119 L.Ed.2d at 90 (Thomas, J., dissenting).

CONCLUSION

In view of the importance of the issues raised herein and in Jackson's petition, Amici respectfully submit that a grant of certiorari is appropriate.

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Respectfully submitted,

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